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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re N.H., a Person Coming
Under the Juvenile Court Law.

2d Juv. No. B291340
(Super. Ct. No. 1506356)
(Santa Barbara County)

THE PEOPLE,

Plaintiff and Respondent,

v.

N.H.,

Defendant and Appellant.

N.H. appeals the juvenile court's order sustaining a wardship petition charging him with carrying a concealed firearm (Pen. Code,¹ § 25400, subd. (a)(2); count 1), carrying a loaded firearm (§ 25850, subd. (a); count 2), possession of a firearm by a minor (§ 29610; count 3), resisting, obstructing, or

¹ All statutory references are to the Penal Code unless otherwise stated.

delaying a peace officer (§ 148, subd. (a)(1); count 4), unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); count 5), and evading an officer (Veh. Code, § 2800.2, subd. (a); count 6). The court also found that the offenses charged in counts 1,2, 5, and 6 were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)).² Appellant was declared a ward of the court and committed to Los Prietos Boys Camp for 180 days. He contends the evidence is insufficient to support the true findings on the gang enhancement allegations. We agree that the specific intent element of the enhancement was not sufficiently proven as to counts 1 and 2, and shall order those enhancements stricken. Otherwise, we affirm.

STATEMENT OF FACTS

Counts 5 and 6

On the night of February 25, 2018, Santa Maria Police Officer Kevin Ochoa was on patrol when a black Hyundai Sonata ran a stop sign directly in front of him. As the Hyundai passed by, Officer Ochoa saw the driver (whom the officer later identified as appellant) and a front-seat passenger. When the officer attempted to conduct a traffic stop, appellant sped away and ran two more stop signs.

Officer Ochoa turned on his siren and pursued the Hyundai, but terminated his pursuit after appellant began driving on the wrong side of traffic. The officer continued in the direction the Hyundai had been driven and eventually found the

² Three additional wardship petitions were also sustained after appellant admitted various charges alleged in those petitions.

vehicle abandoned in the street with the motor running and the driver and passenger doors open.

Officer Ochoa “ran” the Hyundai’s license plate number and discovered that Hovhannes Aroyan was the registered owner of the vehicle. Officer Ochoa contacted Aroyan at his residence. Aroyan did not know his vehicle was missing from his carport and said he had not given anyone permission to drive it.

Aroyan accompanied Officer Ochoa to the location where the Hyundai had been abandoned and looked inside it. Several items that had been in the vehicle were missing. Aroyan also noticed that a gun cleaning kit and box of ammunition he kept in the trunk had been moved to the back seat.

Fingerprints lifted from the gun cleaning kit and the box of ammunition matched appellant and another individual, A.C. After Officer Ochoa discovered this information and viewed a photo of appellant, he was able to identify him as the driver of the Hyundai. Officer Ochoa also recognized appellant from prior interactions with him and had seen his name and photograph during prior police briefings.

Counts 1 - 4

At about 5:30 p.m. on April 23, 2018, Santa Maria Police Officer Erubey Ponce was on patrol when he saw appellant and two other juveniles crossing the street together. One of appellant’s companions was drinking a can of beer and was wearing a black hat and black windbreaker with the letter “P” on them. Based on his training and experience, Officer Ponce was aware that the letter “P” was associated with the West Park criminal street gang. Another officer who subsequently reviewed dash cam footage from Officer Ponce’s patrol car recognized one of appellant’s companions as C.G., a West Park member.

Officer Ponce pulled up behind the three juveniles and activated his lights and siren. All three juveniles ran away in different directions. Officer Ponce followed appellant in his patrol car. Appellant kept his hand in his waistband as he was running, which led the officer to believe he might be concealing a weapon. Shortly thereafter, appellant removed a nine-millimeter semiautomatic handgun from his waistband and threw it onto the driveway of a residence.

Officer Ponce exited his vehicle and ordered appellant to stop. Appellant declined to do so and the officer began a foot pursuit. After briefly losing sight of appellant, the officer saw him again and once again ordered him to stop. Appellant slipped and fell and was apprehended. Officer Ponce searched appellant and found nine-millimeter ammunition in his pocket. Another officer retrieved the handgun that appellant had discarded. The police were unable to apprehend either of appellant's companions, but another firearm was found in the area where one of them had been running.

Gang Expert Testimony

Santa Maria Police Detective Michael Parker testified as the prosecution's gang expert. West Park is a local gang that identifies with the color blue and the letters "W" and "P." The gang has two cliques, the South Side West Park clique and the West Side West Park clique. Members of the gang "nonverbally represent themselves on the street" by wearing hats with a "W" or "P" logo. The gang's primary activities include violent crimes such as murder, attempted murder, and assault, and crimes for profit such as robbery. The most common method of joining a gang is "putting in work" for the gang by committing crimes such as auto theft, vandalism, and robbery.

Detective Parker was familiar with appellant through prior investigations and conversations with him. The detective opined that appellant was an active West Park member known as “Little Insane.” Among other things, appellant had previously admitted to the detective that he was a member of the gang and had a “West Side” tattoo above one of his eyebrows. A.C., whose fingerprints were found on an item in the stolen Hyundai, was also a documented West Park member.

When presented with a hypothetical tracking the facts of the February 25 incident, Detective Parker opined that a West Park member unlawfully taking or driving a vehicle with another member of the gang benefitted the gang by “increas[ing] the individual gang member’s reputation with his own gang.” The detective added that “showing his willingness to commit certain crimes, and his willingness to commit them with other gang members . . . will help increase West Park’s reputation within the community.” The evading offense benefitted the gang because it boosted the perpetrator’s reputation within the gang and “that individual gang member’s reputation is really a reflection upon the whole gang and how that gang is viewed in the community.” Detective Parker further opined that both offenses were committed in association with West Park because another gang member was in the vehicle.

Based on a hypothetical tracking the facts of the April 23 incident, Detective Parker opined that a West Park member unlawfully carrying a concealed firearm with another member of the gang benefitted the gang by “show[ing] a level of . . . commitment to the gang that some individuals do or don’t possess.” The weapon could be used offensively or defensively if the group was approached by rival gang members. The detective further opined that the offense was committed in association with

West Park because “[t]he presence of other individuals carrying firearms and associated with a gang shows the level of association of the individuals. . . . They are not just hanging out in a social setting or playing basketball or playing soccer. They are carrying firearms and walking down the street together.”

DISCUSSION

Appellant challenges the sufficiency of the evidence supporting the gang enhancement findings. He claims the evidence is insufficient to prove he committed the offenses with the specific intent to promote, further, or assist in any criminal conduct by gang members, as provided in subdivision (b)(1) of section 186.22.

In adjudicating appellant’s claim, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence, i.e., evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60 (*Albillar*).) We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*Ibid.*)

“Section 186.22, subdivision (b)(1) imposes various sentencing enhancements on a defendant convicted of a gang-related felony committed with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (*People v. Franklin* (2016) 248 Cal.App.4th 938, 948 (*Franklin*).) “There are two prongs to the gang enhancement under section 186.22, subdivision (b)(1) The first prong requires proof that the underlying felony was ‘gang related,’ that is, the defendant committed the charged offense ‘for the benefit of, at the direction of, or in association with any criminal street gang.’ [Citations.] The second prong ‘requires that a defendant commit the gang-

related felony “with the specific intent to promote, further, or assist in any criminal conduct by gang members.” [Citations.]” (*Ibid.*)

“‘[T]o prove the elements of the criminal street gang enhancement, the prosecution may . . . present expert testimony on criminal street gangs.’ [Citation.] . . . While an expert may render an opinion assuming the truth of facts set forth in a hypothetical question, the ‘hypothetical question must be rooted in facts shown by the evidence.’ [Citation.]” (*Franklin, supra*, 248 Cal.App.4th at pp. 948–949.)

“As for the specific intent prong, “[i]ntent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense.” [Citation.]” (*Franklin, supra*, 248 Cal.App.4th at p. 949.) The requisite specific intent may be inferred from evidence “that the defendant intended to and did commit the charged felony with known members of a gang.” (*Albillar, supra*, 51 Cal.4th at p. 68.) From such evidence the trier of fact “may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.” (*Ibid.* [specific intent prong of section 186.22, subdivision (b)(1) established where three gang members intended to attack the victim and assisted each other in raping her]; see also *People v. Vang* (2011) 52 Cal.4th 1038, 1041 [specific intent established where multiple gang members acted in concert to attack someone who previously associated with the gang].)

The evidence, viewed in the light most favorable to the judgment, supports the juvenile court’s findings that appellant committed the offenses of unlawfully driving or taking a vehicle (count 5) and evading an officer (count 6) with the specific intent to promote, further, or assist in criminal conduct by gang

members. Appellant does not dispute the evidence that (1) he is a member of the West Park gang; (2) someone was sitting next to him in the front passenger seat of the Hyundai when Officer Ortega attempted to stop the vehicle; (3) the vehicle had been recently been stolen from the owner's carport; and (4) fingerprints belonging to A.C., a fellow West Park member, were found on items that had been moved from the vehicle's truck to the back seat. Detective Parker, the prosecution's gang expert, also explained that West Park members "put in work" for the gang by committing crimes such as auto theft, vandalism, and robbery.

From this evidence, the juvenile court could reasonably find that appellant had unlawfully taken the Hyundai in concert with A.C. and thus intended to commit the crime with a known member of his gang. (*Albillar, supra*, 51 Cal.4th at p. 68.) The court could also reasonably find that in committing the evading offense, appellant was also assisting his fellow gang member A.C. in evading arrest. The evidence was sufficient to prove that appellant committed both crimes with the specific intent to assist his fellow gang member's criminal conduct. (*Ibid.*)

The two cases appellant offers in support of his position do not alter our conclusion. In *People v. Rios* (2013) 222 Cal.App.4th 542, the defendant was convicted of vehicle theft and carrying a loaded firearm in a vehicle, with gang allegations found true as to both counts. The defendant had been apprehended in Salinas while driving a stolen vehicle *by himself*, and in the vehicle police found a loaded gun and gang indicia. (*Id.* at pp. 547–548.) In reversing the true findings on the gang enhancement allegations, the court found the evidence was insufficient to prove the defendant acted with the specific intent required by section 186.22, subdivision (b)(1). There was no evidence the defendant

had “acted in concert with other gang members,” that he had been directed to steal the vehicle by another gang member, or that he was transporting the loaded gun so that a gang member could commit a crime. (*Rios*, at p. 572.) The court held that “where the defendant acts alone, the combination of the charged offense and gang membership alone is insufficient to support an inference on the specific intent prong of the gang enhancement.” (*Id.* at pp. 573–574.)

Rios is inapposite. Appellant unlawfully took and drove a vehicle and evaded apprehension while accompanied by a fellow member of his gang. Because the juvenile court as trier of fact could reasonably infer that appellant committed the crimes in concert with another member of his gang, the court could also “fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by [that] gang member[.]” (*Albillar*, *supra*, 51 Cal.4th at p. 68.)

In *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*), defendant Ramon was driving a stolen vehicle with a gun under the driver’s seat. Ramon and his passenger were members of the same gang, and they were in their gang’s territory when police stopped them. (*Id.* at p. 847.) Ramon was convicted of receiving a stolen vehicle and various firearm offenses, with gang allegations found true as to all of the offenses. (*Id.* at p. 846.) At trial, a gang expert testified that the crimes were committed for the benefit of the defendant’s gang and were intended to promote the gang “because the gun and the stolen vehicle could be used to facilitate the commission of a crime.” (*Id.* at p. 849.) The court of appeal reversed true findings on the gang allegations, finding that the expert opinion “could not provide substantial evidence to support the jury’s finding” because “[t]here were no facts from which the expert could discern whether Ramon and [the

passenger] were acting on their own behalf . . . or were acting on behalf of the [gang].” (*Id.* at p. 851.) The court also rejected the notion that the specific intent element could be based on the fact that Ramon was accompanied by another gang member during the commission of the crimes. (*Ibid.*)

We decline to follow *Ramon*, which was issued prior to *Albillar*. As another court has explained, *Ramon* “appears to suggest that the People were required to prove that the defendant acted with the specific intent of assisting his gang, not gang members[.] . . . However, the statute requires only that a defendant act ‘with the specific intent to promote, further, or assist in any criminal conduct by *gang members*’ [Citation.] We would find the evidence in *Ramon* sufficient to meet the specific intent prong of the statute.” (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 661, fn. 6; see also *Albillar*, *supra*, 51 Cal.4th at p. 68.)

We reach a different conclusion, however, regarding the gang enhancements attendant to the firearm offenses. Although it is undisputed that appellant unlawfully possessed a concealed firearm in the presence of fellow members or associates of his gang, the evidence was insufficient to prove he possessed the weapon with the specific intent to promote, further or assist in any criminal conduct by those fellow gang members.

In re Daniel C. (2011) 195 Cal.App.4th 1350 (*Daniel C.*), is instructive. The minor in that case (Daniel) and two other young men were observed walking back and forth inside a market. After his two companions left the store, Daniel picked up a bottle of whiskey and headed toward the exit without making any effort to pay. (*Id.* at p. 1353.) When he was confronted by an employee and attempted to flee, he accidentally broke the bottle and then hit the employee on the head with the broken bottle, causing

injury. (*Ibid.*) Daniel got into a truck that was waiting with the engine running, and the truck was later stopped with Daniel and three companions inside. (*Id.* at p. 1354.)

At Daniel's jurisdictional hearing, a gang expert testified that Daniel and two of his companions were members or affiliates of the Norteño gang. (*Daniel C., supra*, 195 Cal.App.4th at p. 1355.) The expert opined that the robbery was gang-related because (1) Daniel and two of his companions were members or affiliates of the same gang; (2) they coordinated their actions in the market; (3) they were all wearing clothing containing red, which is the color worn by the gang; and (4) crowbars and a baseball bat were found in the truck in which they were apprehended. (*Id.* at p. 1356.) At the conclusion of the hearing, the juvenile court found the gang enhancement allegation as to the robbery true. (*Ibid.*)

The court of appeal agreed with the juvenile court that the evidence was sufficient to establish that Daniel committed the robbery in association with a criminal street gang within the meaning section 186.22, subdivision (b)(1). (*Daniel C., supra*, 195 Cal.App.4th at pp. 1358–1359.) The appellate court concluded, however, there was a lack of evidence showing the specific intent requirement of the statute. The court discounted the expert's testimony and concluded there was no evidence Daniel acted in concert with his companions, or that his companions committed any crime. Neither Daniel nor his companions did anything to identify themselves as gang members other than wearing clothing with the color red, and there was no evidence the young men entered the store with the intention of committing a violent crime. (*Id.* at pp. 1361-1363.)

The evidence of the requisite specific intent as to the firearm offenses is similarly lacking here. Although appellant

possessed a concealed firearm while in the company of at least one fellow gang member, there is no evidence from which it could be inferred that he possessed the weapon *in concert with* his companions. There was no evidence that he ever displayed the weapon, that his companions were aware he was carrying it, or that he had knowledge that one his companions was also apparently armed. The record is also devoid of any evidence that appellant and his companions were in gang territory, that they called out the name of their gang or threw gang signs, or that they were setting out to engage in criminal conduct. Rather, they were simply crossing the street as one of them was drinking a beer.

The People highlight their expert's testimony that appellant possessed the firearm for the benefit of his gang, but that testimony is insufficient to establish the specific intent prong of the gang enhancement. Detective Parker was not asked to offer an opinion on the issue of specific intent. Moreover, his opinion that appellant's firearm offenses benefited his gang "is no better than the facts [up]on which it is based.' [Citation.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618, overruled on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) That opinion was based in part on the hypothetical fact that appellant was carrying a concealed firearm while in the presence of another member or associate of the gang who was also armed. As we have noted, however, there is no evidence from which it can be inferred that appellant knew one of his companions was also armed or that they had come together that afternoon with the intent to commit crimes.

To uphold the gang enhancements on the firearm counts, we would essentially have to conclude that the enhancement could be lawfully applied to any gang member who unlawfully

possesses a concealed weapon while in the presence of other members of his gang. “Such a holding would convert section 186.22(b)(1) into a general intent crime. The statute does not allow that. [Citations.]’ [Citation.]” (*Daniel C., supra*, 195 Cal.App.4th at p. 1364.) Accordingly, the true findings on the gang enhancement allegations on the two firearm counts cannot stand.

DISPOSITION

The true findings on the gang enhancement allegations on counts 1 (carrying a concealed firearm) and 2 (carrying a loaded firearm) are reversed. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

TANGEMAN, J.

Arthur A. Garcia, Judge
Superior Court County of Santa Barbara

Robert L. Hernandez, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Stephanie C. Brennan and Jonathan M. Krauss,
Deputy Attorneys General, for Plaintiff and Respondent.